

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling)	WT Docket No. 05-194
Filed by CTIA Regarding Whether)	
Early Termination Fees Are "Rates)	
Charged" Within 47 U.S.C. § 332(c)(3)(A))	
)	
To: The Commission)	

**COMMENTS OF T-MOBILE USA, INC.
IN SUPPORT OF CTIA PETITION FOR DECLARATORY RULING**

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T-Mobile USA, Inc. (“T-Mobile”) hereby submits its comments in support of the Petition for an Expedited Declaratory Ruling filed by CTIA - the Wireless AssociationTM in the above-captioned proceeding.^{1/} CTIA asks the Commission to confirm that early termination fees (“ETFs”) in wireless carriers’ service contracts constitute “rates charged” for commercial mobile radio services (“CMRS”) and, as such, state regulation of ETFs is barred under section 332(c)(3)(A) of the Communications Act and Commission precedent. For the reasons set forth below, T-Mobile urges the Commission to grant CTIA’s Petition.

INTRODUCTION AND SUMMARY

As part of comprehensive legislation designed to promote competition in the wireless market, Congress added section 332(c) to the Communications Act in 1993. Section 332(c)(3) -- entitled “State Preemption” -- provides that “no State or local

^{1/} *Petition of the Cellular Telecommunications & Internet Association For An Expedited Declaratory Ruling*, WT Docket No. 05-194 (filed Mar. 15, 2005); *see* Public Notice, “Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Filed by CTIA Regarding Whether Early Termination Fees Are “Rates Charged” Within 47 U.S.C. Section 332(c)(3)(A),” WT Docket No. 05-194 (May 18, 2002).

government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . .”^{2/} Congress’s recognition a decade ago that a uniform, national regulatory regime for wireless would promote competition, innovation, and lower prices for consumers has been realized far beyond expectations at that time. As the Commission related in its most recent annual wireless competition report, carriers demonstrate “independent pricing behavior, in the form of continued experimentation with varying pricing levels and structures, for varying service packages, with various available handsets and policies on handset pricing.”^{3/} In addition to the introduction in 1998 of national rate pricing plans, which “altered the market and benefited consumers,” a more recent “trend in mobile telephone pricing has been the expansion of free calling among a particular company’s customers.”^{4/} The Commission also recognized that these innovative service packages generally allow customers to pay after they have incurred charges, instead of on a prepaid basis, and it noted with approval one carrier’s “two-year contract,” which provided unlimited mobile-to-mobile calling.^{5/}

Notwithstanding the express prohibition against state rate regulation in section 332(c)(3)(A), in the past few years, various courts have concluded that they have jurisdiction to adjudicate disputes challenging under state law the reasonableness and

^{2/} 47 U.S.C. § 332(c)(3)(A). This provision permits states to petition the Commission for authority to regulate CMRS rates, and requires the Commission to grant such petition if the state can demonstrate that market conditions fail to protect consumers from unjust and unreasonable rates. A number of states filed petitions under section 332(c)(3)(A) in 1994, but the Commission denied them on the ground that the states had failed to demonstrate market failures.

^{3/} See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Ninth Report, 19 FCC Rcd 20,597, ¶ 113 (2004) (“CMRS Report”).

^{4/} *Id.* ¶¶ 113-114. T-Mobile offers free mobile-to-mobile calling to customers on Family or pooled minute plans. Mobile-to-mobile minutes are directly dialed calls between T-Mobile phones on the USA network.

^{5/} *Id.* ¶ 114.

lawfulness of wireless carriers' assessment of fees when customers cancel contracts early. Similarly, some state public utility commissions and legislatures recently have shown an interest in regulating the levels of and conditions under which wireless ETFs may be charged. Although the courts and other tribunals acknowledge that section 332 bars state regulation of wireless carriers' rates, some of them have determined that ETFs are not "rates" under section 332 but rather are "terms and conditions" of wireless service, resulting in a conflict among the decisions regarding whether ETFs are permissibly regulated by states.^{6/}

T-Mobile agrees with CTIA that it is imperative that the FCC act to establish a uniform, nationwide policy on the permissibility of ETFs, and preempt state regulation of ETFs under section 332(c)(3)(A). ETFs are assessed to recover carriers' costs of providing wireless service and are a fundamental part of the carriers' pricing structures. As CTIA explains, CMRS providers, including T-Mobile, offer service through a variety of rate plans made up of multiple elements, including fees for activation, monthly access, special features, local and long distance airtime, certain roaming charges, and early termination.^{7/} These elements, taken together, compensate wireless carriers for the costs they incur in acquiring and retaining customers, as well as the overall costs of providing wireless services.

Preventing inconsistent state regulation of ETFs, either through court decisions or regulatory rulings, benefits the public by allowing carriers to offer -- on a uniform, nationwide basis -- the service plans and upfront discounts demanded by subscribers. In

^{6/} See 47 U.S.C. § 332(c)(3)(A) ("this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services").

^{7/} See CTIA Petition at 11.

addition, as the Commission has recognized on numerous occasions, the absence of state involvement in wireless rate regulation has helped foster the rapid expansion of the wireless industry. Allowing states to preclude or restrict the use of ETFs, either through a patchwork of likely inconsistent rules or through litigation, would have the effect of undermining nationally the consumer benefits that ETFs have made possible. Such efforts also ignore the fact that, in response to market forces rather than government mandates, T-Mobile and other carriers today offer consumers the option of avoiding ETFs by choosing a prepaid service plan.

Commission precedent unambiguously supports CTIA's position that ETFs constitute carrier rates, the state regulation of which is preempted by section 332. Indeed, in both the wireless and wireline contexts, the Commission has determined that ETFs are components of carriers' rate structures, and are designed to offset reductions in other rate elements. Indeed, the Commission has specifically *refused* to invalidate or reduce ETFs in telecommunications contracts because they help carriers recoup upfront costs when customers cancel their contracts early, and so allow customers to enjoy discounted and stable-priced services. The Commission should confirm these conclusions by granting CTIA's Petition, thereby securing the fullest possible choice and competition for wireless consumers.

I. THE ETF IS A CRITICAL ELEMENT OF T-MOBILE'S RATE STRUCTURE, WHICH HAS BENEFITED CONSUMERS

ETFs have been an essential part of many of T-Mobile's rate plans since at least 1996, allowing the company to offer subscribers innovative pricing that benefits

consumers in the competitive CMRS marketplace.^{8/} The ETF is a “rate charged” because it “directly correlate[s] to and is an integral part of the rates charged by [a wireless provider] for its services under its wireless service agreements.”^{9/} Each of T-Mobile’s rate plans comprises a variety of elements, including, among others, fees for activation, monthly access, special features, local and long distance airtime, certain roaming charges, and early termination. Together, these fees constitute the “price” that T-Mobile charges for the wireless services it provides under each plan. The multiple rate components under any given plan allow T-Mobile to recover its costs and are designed to be competitive with rate plans offered by other wireless companies.

For those plans that include an ETF, T-Mobile offers subscribers handsets and/or accessories at low or no cost and large “buckets” of minutes for low monthly rates in exchange for a subscriber’s commitment to remain a customer for a minimum time period (usually one year). Under those plans, if a subscriber decides to terminate before the end of the minimum contract period, T-Mobile has the right to charge the subscriber an ETF (currently \$200). T-Mobile makes extensive efforts to make sure all customers and potential customers are fully aware of the ETF.^{10/}

Like other components of its rates, T-Mobile charges customers the ETF to compensate the company for the costs of the wireless services T-Mobile provides, the costs it incurs in acquiring customers, and to earn a profit from these business activities.

^{8/} Until July 2002, T-Mobile was known as VoiceStream Wireless.

^{9/} *Redfern v. AT&T Wireless Servs.*, Civ. No. 03-206-GPM, 2003 U.S. Dist. LEXIS 25745, at *2-4 (S.D. Ill. June 16, 2003) (Murphy, J.).

^{10/} In its advertisements, customer contracts (both in the body and on the signature page), and at the point of sale (orally, in writing, or online), T-Mobile explains that customers who take advantage of handset discounts and high-value rate plans are committing to a yearlong contract and agreeing to pay an ETF.

Customer acquisition costs are significant. Not only do most new customers signing term contracts receive steeply discounted handsets, but T-Mobile must have personnel on hand to run credit checks, counsel customers regarding T-Mobile products and services, create and circulate service and equipment documentation, program phones, create and distribute contracts and welcome packages, and execute number portability requests. Similarly, carriers often have to pay commissions to sales representatives and dealers. These are all upfront costs to T-Mobile, but its wireless rate plans are structured to allow subscribers to pay for them throughout the contract period through a variety of elements, including, if cancelled early, a cancellation fee.

Although some plaintiffs' lawyers characterize wireless carriers' term contracts (along with the ETFs) as an effort to "lock" customers into wireless service, in truth, all T-Mobile customers have a choice -- postpaid service with an ETF or prepaid service without an ETF. T-Mobile offers customers that do not wish to make a commitment the option of a prepaid service that has no minimum contractual period and no ETF. Of course, those prepaid rate plans are structured so that customers pay in advance for service, receive lower discounts on handsets, and pay higher airtime fees. The ETF simply allows T-Mobile to offer customers a wider range of service options and pricing plans. In addition, T-Mobile, like all the major carriers, allows subscribers an initial trial period during which service may be terminated without application of an ETF.^{11/}

Notably, notwithstanding the availability of prepaid plans without a term contract -- and without ETFs -- in all T-Mobile markets, the vast majority of T-Mobile customers

^{11/} T-Mobile, together with more than thirty of its competitors, is a signatory to the CTIA Consumer Code, which, among other things, requires wireless carriers to offer a trial period after service is initiated and to disclose fully that an ETF will be assessed if service is cancelled during the remainder of the contract term.

choose postpaid plans with term contracts and ETFs. Consumers overwhelmingly prefer the subsidized handsets and lower monthly and airtime fees that are feasible for T-Mobile only in conjunction with an ETF, and they are willing to enter into a contract with T-Mobile in exchange for those benefits. Indeed, in response to competition and consumer expectations, T-Mobile is considering introducing 24-month plans with even larger handset subsidies and lower monthly charges, and a tenure-based rating that rewards long-term customers with lower rates.

If T-Mobile were not permitted to charge an ETF, or if the ETF were reduced, consumers would suffer because T-Mobile would likely have no choice but to increase its upfront and ongoing charges for wireless services, rather than offering the attractive pricing and service options consumers demand today. T-Mobile is an acknowledged innovator in the wireless marketplace, and has been recognized time and again for making consumer interests the hallmark of its business.^{12/} It goes without saying that the public interest is not served by limiting consumer choice, especially at a time when wireless competition is fierce and consumer demand is pushing T-Mobile to offer more, not fewer, options.

II. THE COMMISSION SHOULD MAKE ITS AUTHORITY CLEAR BECAUSE PIECEMEAL STATE-BY-STATE REGULATION OF WIRELESS TERMINATION FEES WILL HARM CONSUMERS AND COMPETITION

The growth and innovation of the wireless sector has been fueled not only by competition, but also by a framework established by Congress to deregulate state

^{12/} For two years in a row, J.D. Power and Associates has awarded to T-Mobile the claim for “Highest Ranked Customer Service Performance” among all wireless carriers. In addition to the residential consumer awards, J.D. Power and Associates announced in May 2005 that T-Mobile ranked “Highest in Customer Satisfaction with Business Wireless Service.”

oversight of rates and entry. As Congress and the Commission repeatedly have recognized, burdensome regulation has a chilling effect on network deployment, raises the cost of services, and diverts funds that could be used to create additional creative products and services, thereby discouraging new subscribers.^{13/} As explained above, state law limitations on ETFs are unnecessary and would in fact be counterproductive by reducing consumer choice. Moreover, if state legislatures or courts could impose their own limitations on ETF charges, the resulting state-to-state inconsistencies would be particularly problematic for mobile service providers that “operate without regard to state lines.”^{14/} Indeed, it was to prevent that very result that Congress prohibited state rate regulation of commercial mobile radio services.^{15/}

The absence of state regulation of wireless rates and entry has benefited consumers through increased choices of service plans and lower prices, and has helped foster competition and the expansion of the wireless industry. The Commission’s most recent analysis of competition in the CMRS market illustrates the success that rate deregulation has had in encouraging innovative price competition among carriers and expanding the market penetration of mobile services.^{16/} Pricing innovations such as “national rate pricing plans” that allow customers to purchase large “buckets” of minutes

^{13/} See, e.g., *2000 Biennial Regulatory Review: Spectrum Aggregation Limits For Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22,668 ¶¶ 22-25 (2001) (discussing Congress’ and, consequently, the Commission’s, preference for deregulation over regulation); *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11,501 ¶ 82, n.170 (1998) (regulation of ISPs would stifle development of new technologies and services); *TCI Cablevision of Oakland County, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 21,396 ¶¶ 105-106 (1997) (regulatory over-reaching by localities discourages competition and introduction of new services).

^{14/} H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.A.A.N. 378, 587.

^{15/} *Id.*

^{16/} *CMRS Report* ¶¶ 113-114.

that can be used nationwide without incurring roaming or long-distance charges, free night and weekend minutes, and “mobile-to-mobile” calling plans that allow unlimited calls among subscribers of the same company are all examples of the benefits that have resulted from deregulation.^{17/}

The Commission has recognized that this “intense” price competition and plan differentiation has advantaged consumers. There has been “a sharp decline in mobile telephone prices” as well as a “long-term decline in the cost of mobile telephone services.”^{18/} In addition to low prices, the “rapid innovation and diffusion of service offerings” are equally beneficial to consumers.^{19/} The Commission highlighted the “multitude of mobile calling plans” under which “[c]onsumers can choose from service offerings that vary widely with regard to a number of characteristics, including pricing level and structure, handset type, and the scope of ancillary services”^{20/} Indeed, in the *CMRS Report*, the Commission specifically noted and commended one carrier’s plan under which “new customers *who sign a two-year contract* for plans of at least \$40 monthly would also receive unlimited mobile-to-mobile calling.”^{21/}

The ultimate result of these innovative pricing policies has been increased use of mobile services by the public, in harmony with congressional and Commission goals of promoting the growth and development of mobile services. By year end 2004, more than

^{17/} *Id.* ¶¶ 3, 114.

^{18/} *Id.* ¶ 168.

^{19/} *Id.* ¶ 187.

^{20/} *Id.*

^{21/} *Id.* ¶ 114 (emphasis added). While consumers predominantly favor term plans, the *CMRS Report* also noted the availability of prepaid mobile services that require customers to pay for a fixed amount of minutes prior to making calls. At the time of the report, all national wireless carriers offered prepaid services, and T-Mobile had the largest percentage of subscribers using such plans – approximately 11 percent. *Id.* ¶¶ 115-16.

182 million people in the country subscribed to wireless services (up 23.4 million from 2003).^{22/} Wireless carriers also are expanding their coverage substantially, increasing their cell site numbers by eight percent each year.^{23/} T-Mobile itself has expanded from a regional wireless carrier to a nationwide competitor. While T-Mobile's predecessor, VoiceStream Wireless ("VoiceStream"), initially launched service in 1996 in only a few cities -- Honolulu, Salt Lake City, Albuquerque, Oklahoma City, Portland and Des Moines -- it had gained over 125,000 subscribers by year-end 1997 and over 320,000 subscribers by 1998. By 2000, VoiceStream was present in nearly all major markets and had more than 3.8 million subscribers. At least one analyst has attributed the increased growth largely to the availability of family and prepaid plans and a decrease in equipment prices.^{24/}

Today, T-Mobile provides subscribers across the country access to handsets and accessories, buckets of minutes, data services, and additional features under identical rates, terms and conditions. This national offering is important to consumers, who demand uniformity and competitive pricing of minutes. A mobile phone purchased in one state can be used on a business trip or family vacation in another state, truck drivers can check in with their companies' home offices while on the road, and a subscriber may take her handset with her when she moves to a new home without the hassle of reinitiating service. T-Mobile subscribers have high expectations for affordable wireless service regardless of the state in which they reside or travel. Similarly, T-Mobile has

^{22/} See CTIA Semi-Annual Wireless Industry Survey (2005) available at <http://files.ctia.org/pdf/CTIAYearend2004Survey.pdf>.

^{23/} *Id.*

^{24/} *CMRS Report* ¶ 175.

accommodated customer demands that their buckets of minutes include long distance and roaming airtime with no additional charges. T-Mobile's various services packages, both contractual and prepaid, were formulated based on exhaustive market research and are designed to meet the needs and interests of many different types of consumers.

The benefits of competitive national pricing would be lost if each state commission and each court were allowed to create its own policies on the permissibility of ETFs and the circumstances under which they may be assessed. T-Mobile would have to restrict, or possibly even eliminate, the availability to subscribers of price plans with lower upfront rates and subsidized handsets. Such a decision would be to the clear detriment of consumers, who have shown by their behavior that they prefer these plans to any other,^{25/} and would contradict the Commission's interest in promoting equal and affordable access to wireless services.^{26/}

Moreover, T-Mobile, as the fourth national wireless carrier, is more likely to feel the competitive reverberations of such a dramatic change in the pricing of mobile services overall through the regulation of ETFs. T-Mobile has positioned itself as a value and price leader, offering new customers competitive rate plans and handset subsidies with only a one-year contract, in contrast to the two-year commitments demanded by

^{25/} As discussed above, prepaid plans that do not have ETFs are currently available as an option for subscribers to choose and consumers are informed when plans have ETFs, but subscribers overwhelmingly prefer to receive lower and more dispersed costs in exchange for making a service commitment.

^{26/} See *CMRS Report* ¶ 4 (“[C]ompetition continues to afford many significant benefits to consumers. Consumers continue to contribute to pressures for carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and quality of service.”); *Truth-in-Billing and Billing Format*, *National Association of State Utility Consumer Advocates Petition for Declaratory Ruling Regarding Truth-in-Billing*, CC Docket No. 98-170, CG Docket No. 04–208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55, ¶ 35 (rel. March 18, 2005) (“*TIB Second Order*”).

most other carriers for a similar package. In all probability, unpredictable state-by-state changes in wireless carriers' ability to recover their upfront costs through ETFs would have a far greater effect on T-Mobile's business on the margins than it would on other larger competitors. In a consolidating marketplace, the Commission needs to take into account the serious impact of piecemeal, unauthorized state regulation of ETFs on wireless competition.

III. COMMISSION PRECEDENT COMPELS THE CONCLUSION THAT EARLY TERMINATION FEES ARE RATES

As CTIA explains, section 332(c)(3)(A) was designed to implement a federal regulatory framework for wireless communications in order to promote investment and deployment of such services, establish uniformity of regulation across state lines, and prohibit discrimination among similarly situated customers.^{27/} Thus, the Commission “consistently has interpreted the rate regulation provision of [section 332(c)(3)(A)] to be broad in scope . . . ‘prohibit[ing] states from prescribing, setting or fixing rates,’”^{28/} and has found that even generally applicable contract or consumer protection laws may constitute preempted rate or entry regulation if they affect the reasonableness of wireless rates.^{29/}

In applying section 332(c), the Commission has confirmed that the proscription on state rate regulation “extends to regulation of ‘rate levels’ and ‘rate structures’ for CMRS,” meaning that states may not specify “‘the rate elements for CMRS’” or “‘which

^{27/} CTIA Petition at 8-9.

^{28/} *TIB Second Order* ¶ 30 (citing *CTIA v. FCC*, 168 F.3d 1332, 1336 (D.C. Cir. 1999)). See also CTIA Petition at 9-10.

^{29/} See CTIA Petition at 10-11.

among the CMRS services provided can be subject to charges by CMRS providers.”^{30/} Following these precedents, the Commission recently concluded that line item charges on end user bills are CMRS “rate elements” and that “a regulation curtailing a CMRS carrier’s ability to structure its bills and isolate charges into separate line items” would “have a direct effect on a CMRS carrier’s rate structure presented to its end users and, if instituted by a state commission, would be preempted by the Act.”^{31/} ETFs are no different than line item charges under the factors outlined in the *TIB Second Order* because, as explained above, ETFs are fundamental elements of a wireless carrier’s overall rate structure and they permit carriers to recoup the costs of providing wireless service.

Prior Commission decisions have held unambiguously that ETFs are rates. In both the wireline and wireless contexts, the Commission has held that termination fees are part of carriers’ pricing structures which recover upfront investment when a customer cancels service early. In *Expanded Interconnection*, for example, the Commission found that regulation of ETF charges fell directly within its *ratemaking* authority.^{32/} In that case, the Commission directed local exchange carriers to reduce ETFs for certain offerings under the agency’s statutory authority “to prescribe just and reasonable charges for tariffed LEC offerings, including termination charge provisions” and specifically declined to adopt one commenter’s position that alteration of ETFs “is not a prescription

^{30/} *TIB Second Order* ¶ 30 (quoting *Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, Memorandum Opinion and Order, 14 FCC Rcd 19,898, ¶¶ 18-20 (1999)).

^{31/} *TIB Second Order* ¶¶ 30-31.

^{32/} See *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341 ¶¶ 15-17 & n.23 (1993).

at all, but merely a refusal to enforce contractual penalties.”^{33/} In a subsequent decision, the Commission characterized a wireless carrier’s “annual contract (with a cancellation fee of \$10 per month remaining on the contract)” as a “rate structure,” making clear that the ETF was one of the many components of the overall price of wireless service.^{34/}

Other Commission cases involving requests by customers to invalidate long term contracts and applicable cancellation fees support the conclusion that an ETF is an element of a carrier’s rate structure. In *Ryder Communications v. AT&T Corp.*, the Commission upheld ETFs in a contract-tariff on the ground that ETFs are “a valid quid pro quo for the rate reductions included in long-term plans. . . . [B]ecause carriers make investments and other commitments associated with a particular customer’s expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs.”^{35/} Similarly, the Commission has found that it is reasonable for carriers to link price discounts to ETFs because such provisions give carriers assurance that “costs will be recouped in the event a customer fails to utilize the service for the stipulated period of time” and allow customers to “enjoy discounted and stable priced services over the life of the contract term.”^{36/}

^{33/} *Id.*

^{34/} *Application of BellSouth Corporation et. al for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20,599 ¶ 43 (1998).

^{35/} 18 FCC Rcd. 13,603 ¶ 33 (2003).

^{36/} *Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, 18 FCC Rcd 19,020, ¶¶ 692, 698-99 (2003). *See also* *Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc., and AT&T Communications of Virginia, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc.*, 17 FCC Rcd 27,039 ¶ 348 (declining to override ETFs because carrier-customer “took advantage of discount pricing plans that offered lower rates in return for a longer term commitment”).

These precedents compel the conclusion that ETFs are rates for purposes of section 332.^{37/} A state's regulation of whether, when, and how much can be charged in the form of an ETF would affect all other elements of the carrier's rates. Given the Commission's determination that states may neither require nor prohibit wireless carriers from recovering regulatory costs in separate line items, as well as its prior rulings that ETFs are part of a carrier's rate structure, it necessarily follows that state regulation of wireless ETFs is preempted under section 332(c).

^{37/} The Commission's decisions are consistent with the holdings of a number of state and federal courts, which have found that challenges to ETFs are preempted. *See, e.g., Simons v. GTE Mobilnet, Inc.*, No. H-95-5169 (S.D. Tex. April 11, 1996); *Consumer Justice Found. v. Pacific Bell Tel. Co.*, No. BC 214554 (Cal. Super. Ct. July 29, 2002); *Redfern v. AT&T Wireless Servs., Inc.*, Civil No. 03-206-GPM (S.D. Ill. June 16, 2003); *Aubrey v. Ameritech Mobile Comms., Inc.*, 2002 U.S. Dist. LEXIS 15918 (E.D. Mich. June 14, 2002); *but see Esquivel v. Southwestern Bell Mobile Sys., Inc.*, 920 F. Supp. 713 (S.D. Tex. 1996).

CONCLUSION

For the reasons discussed, the Commission should grant CTIA's Petition and find that ETFs are rates under section 332.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2005, I caused a true and correct copy of the foregoing Reply Comments to be served upon the following persons via ECFS and/or via E-mail, as indicated.

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